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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF VIRGINIA
ALEXANDRIA DIVISION

ROSY GIRON DE REYES,)
et al,)
) Civil 16-563
Plaintiffs,)
)
v.)
) Alexandria, Virginia
WAPLES MOBILE HOME PARK) November 8, 2019
LIMITED PARTNERSHIP,)
et al,)
Defendants.)
_____)

TRANSCRIPT OF MOTION HEARING
BEFORE THE HONORABLE T. S. ELLIS
UNITED STATES DISTRICT JUDGE

APPEARANCES:

For the Plaintiffs: Simon Yehuda Sandoval-Moshenberg
Gianna Puccinelli

For the Defendants: Michael Sterling Dingman
Grayson Hanes

Court Reporter: PATRICIA A. KANESHIRO-MILLER, RMR, CRR

Proceedings reported by stenotype shorthand.
Transcript produced by computer-aided transcription.

P R O C E E D I N G S

(2:41 p.m.)

THE DEPUTY CLERK: Civil Case Giron de Reyes, et al.,
versus Waples Mobile Home Park Limited Partnership, et al.,
Case Number 2016-CV-563.

May I have appearances please, first for the
plaintiff.

MR. SANDOVAL-MOSHENBERG: Yes. Good afternoon.
Simon Sandoval-Moshenberg of the Legal Aide Justice Center
for the plaintiffs. With me is pro hac vice counsel Gianna
Puccinelli of the law firm Quinn Emanuel, who will be arguing
this afternoon.

THE COURT: All right. Good afternoon to both of
you.

For the defendants?

MR. DINGMAN: Good afternoon, Your Honor. Michael
Dingman and Grayson Hanes for the defendants.

THE COURT: All right. Good afternoon to you all.

All right. The movant today is the defendant. Let
me hear first from you.

Your briefs on both sides have been reviewed. I have
some knowledge of this. But let me give you an unfettered
opportunity to speak for about 10 or 15 minutes. I do have
one question for you later on. But go ahead and tell me what
you think I should know.

1 MR. DINGMAN: Yes, sir.

2 Well, as the Court is aware, this case is before the
3 Court on summary judgment on remand from the Fourth Circuit
4 with respect to the disparate impact claim only.

5 In the appeal, the Fourth Circuit found that the
6 Court had improperly granted a motion to dismiss with respect
7 to the disparate impact claim and remanded it specifically
8 for consideration of that claim on summary judgment.

9 In their briefs, the plaintiffs seem to suggest that
10 the Fourth Circuit went further than that and granted summary
11 judgment with respect to the prima facie case, or step one,
12 as they call it, of the analysis. I think the decision of
13 the Fourth Circuit is very clear and that the Court was
14 looking at this as a motion to dismiss appeal. That's how it
15 was proffered by the plaintiffs.

16 In fact, the defendants asked the Fourth Circuit to
17 consider the summary judgment record. Plaintiffs opposed
18 that. We quoted in our brief, Fourth Circuit brief, asking
19 the Court not to, quote, sift through the facts.

20 The Court started its analysis by citing the standard
21 Rule 12(b)(6) standards of review, and when it completed its
22 analysis, the Court came to the conclusion that the motion to
23 dismiss was improperly granted, and it remanded the case for
24 consideration, and it specifically said the district court
25 should have addressed the FHA claim of disparate impact

1 theory of liability at the motion for summary judgment stage.
2 And therefore, the Court remanded it specifically for that
3 purpose.

4 I think it is also important, Your Honor, to look at
5 the Court's ruling after it completed its analysis. Under
6 the Rule 12(b)(6) requirements, it said the following:

7 "At the motion-to-dismiss stage, we must accept all
8 well-pled facts as true and all reasonable inferences in
9 favor of the plaintiff. Therefore, accepting these
10 statistics as true, referring to the statistics in the
11 complaint, we conclude that plaintiff sufficiently alleged a
12 prima facie case of disparate impact."

13 But a suggestion that the Fourth Circuit went beyond
14 that and made some summary judgment ruling has no basis in
15 their opinion. There is no discussion of the summary
16 judgment standard, and the court made it very clear that it
17 was remanding to this court to take up this issue on summary
18 judgment, which of course was not done previously. So there
19 wasn't even a summary judgment decision to be reviewed by the
20 Fourth Circuit.

21 So turning now to the substance of the claim, Your
22 Honor, as we have discussed with this Court and briefed many
23 times, the *Inclusive Communities* case is controlling. In
24 that case, the U.S. Supreme Court recognized disparate impact
25 as a claim under the Fair Housing Act for the first time but,

1 in doing so, went out of its way to state that it was
2 enacting what it referred to as cautionary standards, to make
3 sure that the Fair Housing Act disparate impact claim did not
4 improperly impose requirements on both public bodies and
5 private developers with respect to their housing decisions.

6 One of the primary cautionary standards that the
7 court set forth -- and it repeats this throughout its
8 opinion -- and I will talk about that in some detail -- it is
9 that the disparate impact claim under the Fair Housing Act
10 could only be established if the underlying policy is
11 artificial, arbitrary, and unnecessary. And the Court uses
12 that phrase multiple times in its opinion. And it does so
13 because it was clear that, in recognizing disparate impact
14 under the Fair Housing Act claim, it was not inviting courts
15 to second-guess policy decisions by public bodies or by
16 private developers. In fact, it specifically addressed the
17 erroneous assumption in its opinion. The Court said the
18 following:

19 "This case on remand may be seen simply as an attempt
20 to second-guess which of two reasonable approaches that
21 housing authorities should follow in the sound exercise of
22 its discretion in allocating tax credits for low-income
23 housing."

24 Immediately after that, the court says the following:
25 "An important and appropriate means of ensuring that

1 disparate impact liability is properly limited is to give
2 housing authorities and private developers leeway to state
3 and explain the valid interest served by their policies."

4 It goes on to say, "Disparate impact mandates the
5 removal of artificial, arbitrary, and unnecessary barriers."

6 The court went on in its opinion to expand upon that,
7 and it said the following: "Governmental or private policies
8 are not contrary to the disparate impact requirement unless
9 they are artificial, arbitrary, and unnecessary."

10 The Court reiterated that a second time and said the
11 following: Were standings for proceeding with disparate
12 impact suits not to incorporate at least the safeguards
13 discussed here. The disparate impact liability might
14 misplace valid governmental and private priorities rather
15 than solely removing artificial, arbitrary, and unnecessary
16 barriers, and that, in turn, would set our nation back in its
17 request to reduce the salience of grace in our social and
18 economic system."

19 So the Supreme Court said, unless the policy is
20 artificial, arbitrary, and unnecessary, it does not violate
21 the Fair Housing Act, and that disparate impact was intended
22 solely to address policies that are artificial, arbitrary,
23 and unnecessary.

24 In their briefs, the plaintiffs discount that
25 repeated mantra from *Inclusive Communities* and treat it as

1 meaningless. But in fact, it is a basis for an analysis of
2 any Fair Housing Act disparate impact claim. We identified
3 for the Court a number of other federal courts post-*Inclusive*
4 *Communities* who have come to that same conclusion, including
5 two circuit courts. In *Communities v. Property Company*, at
6 920 F.3d 890, the Fifth Circuit said the following: "We read
7 the Supreme Court's opinion in *ICP, Inclusive Communities*, to
8 undoubtedly announce a more demanding test, as set forth in
9 the HUD regulations. As noted by a Minnesota district court,
10 the Supreme Court announced several safeguards to incorporate
11 into the burden-shifting framework to ensure that disparate
12 impact liability does not replace governmental and private
13 priorities."

14 The court went on to conclude accordingly. "As noted
15 by the Fourth Circuit in the Reyes decision here, we were
16 bound to apply the stricter version of the burden-shifting
17 analysis." And the Court went on to hold that unless the
18 policy is shown to be artificial, arbitrary, and unnecessary,
19 there is no disparate impact claim.

20 The Eighth Circuit came to the same conclusion in
21 *Ellis v. City of Minneapolis*. Again, citing almost verbatim
22 the language from the Supreme Court's decision in *Inclusive*
23 *Communities* regarding artificial, arbitrary, and unnecessary
24 policies, it said the following: "The Courts warned
25 disparate impact liability might displace valid governmental

1 and private priorities rather than solely removing
2 artificial, arbitrary, and unnecessary barriers."

3 The plaintiffs have not cited to this Court a single
4 case where a federal court has come to the conclusion that
5 the Supreme Court's repeated reference to artificial,
6 arbitrary, and unnecessary policies is meaningless. It is,
7 in fact, the essence of that decision. And they have
8 provided no facts for this Court that can possibly satisfy
9 that requirement.

10 The policy at issue -- and there is no dispute about
11 this -- is intended to assist in leasing decisions, credit
12 checks, background checks, avoiding criminal liability under
13 the anti-harboring statute. There are no facts to suggest
14 those are artificial interests as opposed to valid interests.
15 In fact, this Court found as much in its prior decision on
16 summary judgment with respect to disparate treatment. Nor
17 can there be an argument that using Social Security numbers
18 and valid U.S.-issued identification is arbitrary and
19 artificial. At the end of the day, the plaintiffs' case is
20 simply we believe you can use ITINs or foreign
21 passports -- and I will talk about that more in a moment --
22 that's a good alternative. That's not what the Supreme Court
23 created when it recognized disparate impact under the Fair
24 Housing Act.

25 THE COURT: A good alternative to what?

1 MR. DINGMAN: To the policy that requires a Social
2 Security number or a valid U.S. document showing legal
3 presence in the United States.

4 So what they're doing essentially --

5 THE COURT: -- going to come back in a moment as to
6 why those two -- that is, the passport and the tax ID
7 numbers -- in your view are not sufficient.

8 MR. DINGMAN: Yes, sir.

9 THE COURT: All right. That seems to be the
10 principal focus of the parties' dispute.

11 MR. DINGMAN: I agree with the Court.

12 And the point I'm making at this stage is that the
13 Supreme Court did not suggest that the federal court should
14 second-guess what are valid policy decisions simply because
15 one party says, well, I think you can do sort of the same
16 thing with this policy, or you should build that housing
17 development here instead of there. If it is a -- if a valid
18 interest has been demonstrated -- and that's the language
19 used by the Supreme Court in *Inclusive Communities* -- and it
20 is not arbitrary or artificial, then there cannot be a
21 disparate impact claim under the Fair Housing Act.
22 Otherwise, courts would be invited to second-guess housing
23 decisions, which the Supreme Court expressly said, in
24 *Inclusive Communities*, it was not intending to create with a
25 disparate impact claim under Fair Housing.

1 There is also one other overarching issue in this
2 case before we get to the three-step analysis, and that has
3 to do with the Supreme Court also finding in *Inclusive*
4 *Communities* that there cannot be a disparate impact claim
5 under the Fair Housing Act if the policy is required, or the
6 defendant in this case, is substantially limited in its
7 discretion with respect to the policy. And we have discussed
8 and argued with this Court, and Your Honor wrote about this
9 in your summary judgment opinion, the impact of the
10 anti-harboring statute as it was applied by Judge Trenga and
11 this Court and then interpreted by the Fourth Circuit in the
12 *Aguilar* case.

13 At the heart of that case, Your Honor --

14 THE COURT: Which case?

15 MR. DINGMAN: *United States v. Aguilar*.

16 THE COURT: All right. Go on.

17 MR. DINGMAN: The Court was presented with the issue
18 of whether substantial facilitation requirements so-called
19 was necessary for a conviction under the anti-harboring
20 statute as opposed to a reckless disregard of information
21 that would put one on notice that the person that you're
22 leasing to is in fact in the United States illegally. The
23 conviction was upheld, and the Fourth Circuit said two things
24 that I think are very important. First, it said, "A
25 defendant acts with reckless disregard where she is aware of

1 but consciously ignores facts and circumstances clearly
2 indicating that an individual is an undocumented alien." The
3 court then said: "Circumstantial evidence alone can
4 establish the defendant's knowledge of reckless disregard
5 that the people harbor are illegally in the country."

6 And one of the facts that the Fourth Circuit pointed
7 out in affirming the conviction in that case was that the
8 defendant admitted, quote, that it was the same to her
9 whether her tenants possessed proper documentation or did
10 not.

11 In response, the plaintiffs point to cases from other
12 circuits, which are not binding. They suggest that this
13 Court should ignore *Aguilar* because they claim it is an
14 unpublished opinion. In fact, when you look at the opinion,
15 it refers to Appellate Rule 32.1, which only discusses
16 unpublished decisions prior to January 1, 2007. This case
17 is, in fact, binding on this Court. It is the only case in
18 which the Fourth Circuit has addressed the standards for a
19 criminal conviction under the anti-harboring statute.

20 When you apply that finding to the facts here, it is
21 clear that the defendants are substantially limited in their
22 discretion. What is being suggested is defendants should
23 ignore the fact that there are illegal aliens or undocumented
24 aliens, however you want to describe them, at the park,
25 applying to live at the park, living at the park. The

1 essence of the plaintiff's case is that there's a large group
2 of undocumented aliens living at the park. When they're
3 asked to provide basic documentation and they cannot, that is
4 a further indication that they're in the United States
5 illegally.

6 Plaintiffs have even suggested that the four female
7 plaintiffs in the case should be able to come back and live
8 at the park. Well, it is undisputed that they're in the
9 United States illegally.

10 THE COURT: Come back and do what? I'm sorry.

11 MR. DINGMAN: Live in the park. Move back in.

12 THE COURT: All right.

13 MR. DINGMAN: In that instance, the defense would
14 have actual knowledge that they were renting to someone who
15 is in the country illegally.

16 So the discretion is substantially limited here
17 because any landlord under those facts and circumstances
18 would be compelled to do exactly what the policy does here,
19 which is to ask for, if you do not have a Social Security
20 number, proof of legal residency in the United States.

21 Turning now to the three-step process under HUD,
22 which, by the way, is not controlling. The Fourth Circuit
23 itself in the appeal in this case specifically found, as all
24 the circuit courts have and must, that the Supreme Court's
25 decision in *Inclusive Communities* controls, not the HUD

1 guidelines.

2 So the first step, the plaintiffs are required to
3 show that there will be a disparate impact as a result of
4 this policy and they must establish a robust causal
5 connection between the policy and the claimed impact.

6 With respect to causality, there is none. At the
7 summary judgment stage, the Court is no longer confined to
8 the allegations in the complaint. The Court can look at the
9 actual facts in this case. And the actual facts in this case
10 demonstrate beyond any doubt that the only reason that the
11 plaintiffs are impacted at all is because of the illegal
12 status of the four female plaintiffs. That's it.

13 The four male plaintiffs who have proper
14 documentation, who are in the United States illegally,
15 admitted that yes, we complied with the policy --

16 THE COURT: Who are in the United States legally
17 or --

18 MR. DINGMAN: Legally.

19 THE COURT: I thought you said "illegally."

20 MR. DINGMAN: If I did, I apologize, Your Honor.
21 That was not my intent.

22 THE COURT: Go ahead.

23 MR. DINGMAN: So there is no robust causality.

24 The second piece, Your Honor, is it is the
25 plaintiffs' burden to prove that there will be a disparate

1 impact. They rely primarily on testimony from an expert
2 witness, Professor Clark, regarding the undocumented
3 population.

4 One of the things that the Supreme Court -- I'm
5 sorry -- the Fourth Circuit talked about in the appeal in
6 this case was you have to look at the impact on Latinos as a
7 class. There is no evidence presented by the plaintiff that
8 as a result of this policy the number of Latinos who lease at
9 the park has declined, that the number of applicants rejected
10 has increased, that the number of Latino occupants has
11 declined. There is absolutely no evidence that has been
12 presented to show that this policy has impacted Latinos as a
13 class at all. Instead, their case is predicated solely on
14 the undocumented Latinos, which again gets you back to the
15 causality. You can't disconnect those two things.

16 So, first of all, there is no evidence that shows
17 that Latinos as a class have been impacted. With respect to
18 the undocumented population, they rely solely on the opinions
19 of Professor Clark, which are completely unreliable based
20 upon his own admissions. And this is not, as the plaintiffs
21 suggest, a contest between two experts. What we are saying
22 to the Court and what we think is clear from Professor
23 Clark's own admissions is that his opinion is completely
24 unreliable for two fundamental reasons.

25 Professor Clark testified -- it is in his report as

1 well -- that in looking at the undocumented population, he
2 relied solely on statistics and information from the Center
3 for Migration Studies, referred to as CMS. He looked at what
4 was referred to as the Burke PUMA, which is a section of
5 Fairfax County that has a population of 157,949 people. CMS
6 estimated that 31.4 percent of the Latino population in the
7 PUMA are undocumented. But his opinion was based on the
8 undocumented population in Census Tract 4406, which Professor
9 Clark says has a population of 5,944 people, roughly
10 3 percent of the population of the PUMA.

11 So what does Professor Clark do? He takes a 31.4
12 percentage of undocumented Latinos at the PUMA level and
13 applies it at the tract level with no change. And Professor
14 Clark himself admitted in his deposition that as you go from
15 a larger population to a smaller population, the percentages
16 and your margin of error -- which we will be talking about in
17 a minute -- are less reliable for obvious reasons. You're
18 going from a review of almost 160,000 people to a review of
19 6,000 people, and he uses the same percentage with no change.
20 It defies his own description of what is necessary for valid
21 statistical analysis.

22 The second part of his error is what is called the
23 margin of error. Again, Professor Clark admitted that's an
24 important element in determining the reliability of any
25 statistical analysis because, in his words, it is an

1 estimate, it is not a count. In any statistical analysis,
2 you have to have a margin of error. So how did Professor
3 Clark come up with this margin of error here?

4 Well, he could have used CMS data. CMS, at the
5 national level, has a margin of error of 9 percent. He
6 ignored that. Instead, there is another survey called the
7 American Community Survey that does not track or document
8 illegal aliens. It simply does a review of the population.

9 At the track level, ACS said, with respect to all
10 Latinos, not undocumented, its margin of error was 26
11 percent. That's the same margin of error that Professor
12 Clark uses for his estimate of the undocumented population
13 despite the fact that Professor Clark himself said that it is
14 much harder to track the undocumented population for the
15 obvious reason that they don't want to be found. And he
16 admitted in his deposition, well, maybe it could have been
17 higher.

18 So if you just apply Professor Clark's own testimony,
19 it is clear that the MOE of 26 percent had no basis. He is
20 taking an MOE for all Latinos and applying it to a subset of
21 undocumented Latinos, with no change. And he could have used
22 the CMS percentage at the national level because he used CMS
23 data all the way through his process of analysis, but he
24 chose not to. Without knowing what his MOE actually is,
25 there is no basis for this Court to accept his opinions. And

1 the only point where there might be an argument that there is
2 a duel of experts is our expert, Dr. Weinberg -- who worked
3 at the Census Bureau for many years -- stated in his report a
4 26 percent margin of error makes that estimate unreliable.
5 And if you look at just the numbers and the swing, and in
6 Professor Clark's own report, the variation with respect to
7 how many undocumented Latinos are in this tract goes from 223
8 to 379. And he has a similar swing with respect to Asian
9 undocumented aliens in the same tract. That's just not
10 reliable. And the fact is, as Professor Clark's admissions
11 show, is that MOE must be higher because he is trying to
12 document a different population that he himself testified
13 does not want to be found. So they have failed to show any
14 statistical basis for disparate impact. For that reason,
15 summary judgment should be granted.

16 With respect to step two -- and I will try to pick up
17 the pace here, Your Honor -- there is a dispute between the
18 plaintiffs and the defendants as to what is the standard.
19 They claim that we have to show a business necessity. But
20 that's not what the Supreme Court said in *Inclusive*
21 *Communities*. I quoted this previously in my argument. What
22 the Supreme Court said is, if a party shows a valid interest,
23 then that's sufficient. That's the standard in *Inclusive*
24 *Communities*, show a valid interest. And the court says
25 that --

1 THE COURT: What is the valid interest here?

2 MR. DINGMAN: The valid interest here -- and this is
3 something that was addressed by Your Honor in your summary
4 judgment opinion, is to make leasing decisions, to conduct
5 credit checks, to conduct criminal background reviews, and to
6 avoid criminal liability under the anti-harboring statute.
7 Those are all clearly valid interests. In the Court's
8 summary judgment opinion -- and I understand that was with
9 respect to disparate impact -- the Court said the
10 following --

11 THE COURT: No, it was with regard to disparate
12 treatment.

13 MR. DINGMAN: I'm sorry. Yes, sir.

14 The Court said the following: "Defendants had met
15 their burden of production to articulate legitimate
16 nondiscriminatory justifications for the policy." And the
17 Court identified confirming lease applicants' identities,
18 performing criminal and credit background checks, minimizing
19 loss of eviction, to avoid potential criminal liability under
20 the anti-harboring statute. Frankly, Your Honor, the
21 plaintiffs have not contended that these are not valid
22 interests. Now, they argue on the anti-harboring statute
23 that since courts outside the Fourth Circuit have taken a
24 different approach that we should somehow feel comfortable
25 that there is no exposure to criminal liability. But they

1 have not proffered any facts nor any expert to say that it's
2 unreasonable for a landlord to conduct criminal background
3 checks. There is no valid interest in doing credit checks.
4 There is to valid interest in going through a lease
5 underwriting process. They have no facts to refute the
6 evidence that has been presented.

7 One of the things they do is attack the expert that
8 we proffered, Mr. Caruso, but they have no expert to
9 contradict his testimony. And what is important in his
10 opinion -- it's primarily -- to a large extent, it is based
11 on his experience. He testified that he managed tens of
12 thousands of residential units; and in doing so -- for a
13 number of different landlords -- they implemented the same
14 policy of requiring this type of documentation.

15 CoreLogic, who is a third-party entity who does the
16 criminal background checks and credit checks, asked for the
17 same documentation under the policy. What facts have the
18 plaintiffs presented to show that these are not valid
19 interests? None. No one.

20 So the last argument is, well, there's a better way
21 to do this. You're not required -- you can get the
22 information you need to do your credit checks and your
23 criminal background checks through ITINs and through foreign
24 passports. And Your Honor is exactly right, that's been the
25 essence of this case from the beginning. If you go back and

1 you read paragraph 32 of the Complaint, that's precisely what
2 they said. You can achieve your credit and criminal
3 background checks by using ITINs and foreign passports.

4 We have provided unchallenged statements from the IRS
5 that says ITINs are not reliable, they were never intended
6 for identification purposes.

7 As we have made clear -- and again, there is no
8 factual dispute -- the first step in any valid
9 check -- background check, credit check -- is making sure
10 that the identity of the person who is being the subject of
11 that check is who they say they are.

12 THE COURT: Well, a passport would do that; wouldn't
13 it?

14 MR. DINGMAN: A passport from a foreign government
15 that we have no idea how exactly it was put together or what
16 the requirements were to obtain it? One of the plaintiffs in
17 this case used a fake passport to gain entry into this
18 country.

19 In the United States -- and this is also
20 uncontradicted -- because this is exactly what the male
21 plaintiffs did -- they had to go through an in-person
22 interview. A man looked across the table at them and
23 verified who they are and who they say they are. They were
24 fingerprinted. That's how they obtained their documents that
25 satisfied the policy.

1 How a foreign government issues its passports, as
2 Your Honor was talking about in some of the cases, who knows?
3 Who knows what the process is?

4 So what is being suggested is rely on ITINs, which
5 the IRS itself says are not reliable. We don't issue these
6 numbers for identification purposes. And in the information
7 we submitted, the IRS has said it's abused significantly.
8 Why? Because there is no in-person interview. All you have
9 to do is send in documents and you receive an ITIN. There is
10 no one who's identifying that you are who you say you are in
11 that application. That's why the policy requires a Social
12 Security number or documentation that the person is legally
13 in the United States because there is a process -- it is not
14 infallible -- as Your Honor pointed out previously, any
15 document can be the subject of a forgery, but these are the
16 best and most reliable indices of the identity of the person
17 who is being asked to submit to the credit check or the
18 criminal background check. And this gets again to this
19 overarching requirement that the policy be shown to be
20 artificial, arbitrary, and unnecessary.

21 We're here discussing, well, are ITINs and Social
22 Security numbers the same. We clearly say that they're not,
23 and so does the IRS. But this is not the kind of debate that
24 the Supreme Court intended when it made its decision in
25 *Inclusive Communities*. There is no dispute that asking for

1 Social Security numbers in these documents is a reasonable
2 thing to do. So how can there be disparate impact liability
3 as outlined in *Inclusive Communities*.

4 And to put an end to that, Your Honor, in their
5 brief, in their step three analysis, what the plaintiffs
6 suggest is, well, you could use exactly what the policy
7 requires with respect to lessees. A contention that there is
8 no other way to do it. But they say, with occupants, and
9 they're referring to the female plaintiffs, ITINs and foreign
10 passports are good enough. Well, that makes no sense. The
11 issue here is identity verification. You can -- it doesn't
12 matter whether you're a lessee or an occupant, if your
13 identity is not validated, whatever check is done is
14 worthless. So there is no distinction whether you're a
15 lessee or an occupant as to what is necessary at the first
16 step to identify this person.

17 So they have now conceded, with a lessee, there is no
18 other way. That's their step 3 proposal.

19 THE COURT: What did the spouses, the men, what did
20 they submit?

21 MR. DINGMAN: The men had temporary passports or
22 visas that were validly issue by the United States
23 government. And we went through in our prior submissions,
24 based on the testimony of the male plaintiffs and their
25 discovery responses, that they were fingerprinted, that they

1 were interviewed, they have to go back I think on an annual
2 basis. So there is a process that they went through. They
3 were fingerprinted, and they have to continually engage in
4 this process on an ongoing basis. The female plaintiffs have
5 done none of that.

6 So they say, well, they have ITINs. Well, I can take
7 any document and send it to the IRS and get an ITIN. Even as
8 a woman. No one is looking across the table and saying, are
9 you the person who is submitting this application. There is
10 absolutely no verification, which is why the IRS itself says
11 it is rife with fraud. And it is not reliable for
12 identification purposes.

13 So there is no other alternative that satisfies the
14 identification requirement of this policy. And more to the
15 point, Your Honor, again, this is not what the Supreme Court
16 intended when it recognized disparate impact under the Fair
17 Housing Act.

18 The plaintiffs actually argue that this court should
19 find that the policy's artificial and arbitrary because they
20 contend ITINs are a reasonable substitute. That doesn't make
21 the policy arbitrary or artificial. And it gets the Court
22 into second-guessing, which you don't want to, because the
23 Supreme Court said, if we go down that path, then we're going
24 to inject race into every decision, and we're going to
25 confront some difficult constitutional issues. That's why

1 we're not second-guessing. We're saying, if a private entity
2 or a public body has a valid interest in the policy at issue,
3 then there is no violation of the Fair Housing Act under
4 disparate impact liability claim. There are no facts to show
5 that this policy is arbitrary or artificial or unnecessary.
6 In fact, the plaintiffs have not proffered any facts to
7 challenge that, and we would ask that the Court grant summary
8 judgment.

9 THE COURT: All right. Thank you.

10 Ms. Puccinelli.

11 MS. PUCCINELLI: Yes, Your Honor.

12 Your Honor, I quickly wanted to start off this
13 afternoon by correcting a few things regarding both the
14 posture of the case before the Fourth Circuit as well as the
15 standard that the Fourth Circuit has mandated be applied in
16 this case at this stage of the analysis.

17 Defendants have said that the Court, in its motion to
18 dismiss decision, dismissed the disparate impact claim. And
19 then the Fourth Circuit remanded again to consider summary
20 judgment on the disparate impact claim. In reality, while
21 this Court found that the plaintiffs could not use disparate
22 impact to proceed with their Fair Housing Act claim, it did
23 not dismiss the Fair Housing Act claim until the summary
24 judgment stage. So the Fourth Circuit, in considering
25 plaintiff's appeal, was actually considering both the motion

1 to dismiss decision and the motion for summary judgment
2 decision.

3 THE COURT: Can you point to language in the Fourth
4 Circuit opinion that makes that clear?

5 MS. PUCCINELLI: Yes, Your Honor.

6 "On appeal, plaintiffs contend that the district
7 court erred in granting Waples' motion for summary judgment
8 on the FHA claim. Moreover, plaintiffs argue that the
9 district court erred in concluding that their FHA claim could
10 not continue past the motion to dismiss stage under a
11 disparate impact theory of liability." And that's erred in
12 failing to substantively address this theory considering the
13 cross motion for summary judgment, and that is on page 422,
14 Your Honor.

15 THE COURT: That doesn't mean the Fourth Circuit
16 ruled on that. I thought that what the Fourth Circuit said
17 is a disparate impact wasn't appropriately addressed at the
18 motion to dismiss stage but ought to be appropriately
19 addressed at the summary judgment stage.

20 MS. PUCCINELLI: Correct, Your Honor, but the court
21 needed to reinstate the plaintiff's Fair Housing Act claim in
22 order to return it to this case so that summary judgment
23 could be reconsidered.

24 THE COURT: On disparate impact?

25 MS. PUCCINELLI: Correct.

1 THE COURT: I'm not sure I see how you and the
2 defendant are in disagreement.

3 MS. PUCCINELLI: Just that the Court was considering
4 both the summary judgment ruling that this Court made and the
5 motion to dismiss ruling --

6 THE COURT: But they didn't rule on summary judgment.
7 They didn't remand and say, okay, it's all over on disparate
8 impact.

9 MS. PUCCINELLI: Correct, Your Honor. But they
10 needed to reinstate the Fair Housing Act claim.

11 THE COURT: But only the disparate impact portion of
12 it.

13 MS. PUCCINELLI: Yes.

14 THE COURT: All right. Go on.

15 MS. PUCCINELLI: And contrary to what the defendants
16 have represented, there are, in fact, two controlling
17 decisions in this case," *Inclusive Communities*, as well as
18 the Fourth Circuit's decision. And the Fourth Circuit set
19 forth the standards to apply at each stage of the disparate
20 impact analysis. Under -- and this is at page 424. And the
21 court said, "under the first step, the plaintiffs must
22 demonstrate the robust causal connection between the
23 defendant's challenged policy and the disparate impact of a
24 protected class.

25 It goes on to state, "Under the second step, the

1 defendant has the burden of persuasion to state and explain
2 the valid interests served by their policies," and then in
3 parentheses, "citing to *Inclusive Communities*, stating that
4 this step is analogous to Title VII's business necessity
5 standard. So defendants are, therefore, incorrect in
6 inserting that *Inclusive Communities* did not also require
7 defendants to show a business necessity.

8 THE COURT: Well, they are correct because that is
9 not in any *Inclusive* opinion. It is in the Fourth Circuit
10 opinion.

11 MS. PUCCINELLI: It is also in *Inclusive Communities*,
12 Your Honor.

13 THE COURT: Oh, it is? What page is that on?

14 MS. PUCCINELLI: That is on page 2522.

15 THE COURT: All right. Go on.

16 MS. PUCCINELLI: In the third step of the framework,
17 the Fourth Circuit says, "In order to establish liability,
18 the plaintiff has the burden to prove that the defendant's
19 asserted interests could be served by another practice that
20 has a less discriminatory effect."

21 THE COURT: That is the real gist of your argument
22 here. You think that the tax ID numbers and the foreign
23 passports would satisfy any legitimate interests they have
24 and would not have any discriminatory impact.

25 MS. PUCCINELLI: Correct, Your Honor.

1 THE COURT: What do you say to their argument to the
2 contrary, that the tax numbers are not reliable, nor are
3 foreign passports?

4 MS. PUCCINELLI: Well, Your Honor, defendants have
5 not offered any actual evidence that foreign passports are
6 not reliable. They only have testimony from their expert,
7 Mr. Caruso, who notably has his primary experience in the
8 form of federally funded housing; whereas, defendants --

9 THE COURT: Well, they have offered evidence, but you
10 say that evidence isn't very persuasive.

11 MS. PUCCINELLI: Correct, Your Honor.

12 THE COURT: That's a better way to put it, not that
13 they haven't offered evidence.

14 MS. PUCCINELLI: Well, Your Honor, Mr. Caruso merely
15 states that the U.S. system of identifying identity is the
16 gold standard. He doesn't actually tear down any foreign
17 governments's other similar efforts to verifying identity
18 through the granting of passports.

19 Also, Your Honor, plaintiffs have provided evidence
20 that neither a Social Security number, nor even an ITIN are
21 necessary to, for example, run credit checks or run criminal
22 background checks. We've put forth a declaration from
23 defendant's current identity verification lease underwriting
24 system, Yardi, that explains all of this, and says that
25 Social Security numbers and ITINs could help to enhance the

1 reliability of those checks but are not, in fact, necessary
2 to run them.

3 And returning quickly back to the prima facie case,
4 the first step under the burden-shifting framework, when you
5 look to the Fourth Circuit's opinion, they don't actually
6 articulate any additional steps like what defendants have
7 articulated, including separating out the artificial,
8 unnecessary, arbitrary framework and motivation for disparate
9 impact as a separate step to satisfy in order to put forth a
10 prima facie case. Nor did they actually include this
11 substantial limitation criteria as a part of the first step,
12 either.

13 Defendants actually argue that before the Fourth
14 Circuit, and the Fourth Circuit still, as you can see on
15 page 425, states that "to establish causation in a disparate
16 impact claim, the plaintiff must begin by identifying the
17 specific practice that is challenged."

18 They then go on to say a few lines down,
19 "Additionally, the plaintiff must offer statistical evidence
20 of a kind and degree sufficient to show that the practice in
21 question has caused the exclusion complained of because of
22 their membership in a protected group." Those are the two
23 steps that are required to show a prima facie case of
24 disparate impact, and that's what plaintiffs have put forward
25 in this case.

1 And that evidence has come in the form of two
2 separate types of proof, the first being Professor Clark's
3 analysis, which contrary to what defendants have said, is in
4 fact reliable. They did not submit a *Daubert* motion to try
5 and get him kicked out. They have not tried to attack his
6 qualifications. In fact, Professor Clark stands by his
7 methodology as shown in his rebuttal report stating that
8 Dr. Weinberg's analysis has -- he has been unable to
9 replicate it and actually reaches an absurd result by
10 creating a margin that goes from zero to somewhere in the
11 600s, and points to the fact that his and Dr. Weinberg's
12 point estimates for the number of undocumented immigrants in
13 the tract are almost the same, which is a better indicator of
14 the reliability of his estimate than the margin of error,
15 which merely shows a range of potential numbers that could
16 actually contain the true population of undocumented
17 immigrants in the tract.

18 And plaintiffs have also offered two reports
19 generated by the defendants, which show -- and as this Court
20 recognized in its undisputed facts in its previous summary
21 judgment opinion -- that the majority of individuals,
22 91 percent in one report, and 84 percent in the other report,
23 of Latinos were impacted by the policy, both of which
24 clearly -- between Dr. Clark's analysis, Professor Clark's
25 analysis and this direct evidence show a disparate impact.

1 Turning to the second prong of the disparate impact
2 analysis, defendants don't even acknowledge that they had to
3 demonstrate a business necessity, which, as this Court
4 recognized, is a different and more difficult standard to
5 satisfy. And that was from the Court's motion -- ruling on
6 the motion to dismiss. And while defendants' claim that the
7 business objectives that they have put forth are legitimate,
8 they have not shown that they are true business necessities
9 such that the policy is required in order to fulfill them.
10 And that much is evident from the fact that they have not
11 shown that a foreign passport is less reliable than a Social
12 Security number or an ITIN to verify identity. I don't know
13 about anyone else, but I got my Social Security number when I
14 was a baby, so I didn't have anyone sitting across from me
15 interrogating me about my criminal history or anything like
16 that. So the fact that the male plaintiffs may have
17 undergone that interrogation in order to get their own Social
18 Security numbers is not dispositive for the majority of the
19 population.

20 And going to the next business justification,
21 plaintiffs have offered proof that a Social Security number
22 and other documentation are not actually needed to run a
23 credit check, and credit checks are not even run on all of
24 the occupants of the park, they are only run on the actual
25 lessees.

1 And turning to the next business justification, we
2 have the criminal background checks. The female plaintiffs
3 can get criminal background checks without having a Social
4 Security number. In fact, Rosy Giron de Reyes, one of the
5 named plaintiffs in this case, received a criminal background
6 check and attempted to offer it to defendants to satisfy
7 their policy and was rejected.

8 And as to release underwriting concerns, plaintiffs
9 have demonstrated that -- the male plaintiffs alone who
10 validly under the policy applied for leases and were granted
11 leases qualified for receiving, using their own credit, using
12 their own income, without the female plaintiffs at all. And
13 that is why that dovetails with our third step, which is why
14 we have offered this proposed alternative to the policy that
15 has a less discriminatory effect because we have this clear
16 situation where you have a male plaintiff who goes to the
17 leaseholder office, is evaluated under his own merits,
18 irrespective of the other occupants of his home, is granted a
19 lease. There is simply no need to go through the rigamarole
20 of checking out the wife's requirements as well just because
21 she is there. We concede, though, that there is a business
22 interest in verifying the criminal background checks. But as
23 we have already said -- of occupants -- as we have already
24 said, female plaintiffs can get criminal background checks
25 without Social Security numbers. They have gotten them.

1 They could satisfy that business interest without the policy
2 as written, without the documents required by the policy.

3 And as to the anti-harboring interest, the majority
4 of courts that have considered this issue have held that
5 merely renting to undocumented immigrants does not violate
6 the anti-harboring statute.

7 THE COURT: What about the Fourth Circuit?

8 MS. PUCCINELLI: In the Fourth Circuit, the
9 defendants' conduct went above and beyond merely renting to
10 undocumented immigrants. She had a history of disregarding
11 warnings regarding the need to -- regarding the need to --

12 THE COURT: Don't you think there is a split in the
13 circuits about that?

14 MS. PUCCINELLI: No, Your Honor, because the
15 defendant's conduct in *Aguilar* went above and beyond the
16 conduct that we have even remotely potentially in the case of
17 defendants here. And also, it is worth noting that because
18 when this issue was presented to the Fourth Circuit by
19 defendants, the Fourth Circuit did not credit that the
20 defendants had their hands tied by the anti-harboring
21 provision of the ICRA.

22 THE COURT: What did the Fourth Circuit say about it?

23 MS. PUCCINELLI: It didn't say anything about it,
24 Your Honor.

25 THE COURT: So we really don't know what the Fourth

1 Circuit would say about whether the anti-harboring statute
2 presents the defendants with any need to get to the bottom of
3 who is staying in some of their apartments.

4 Your point is there are a number of cases from other
5 circuits that indicate that merely renting to somebody is not
6 harboring, but the Fourth Circuit has a case where that did
7 occur, but you said the conduct went beyond that. So it is
8 distinguishable. I understand the argument.

9 Go ahead and finish your argument. The hour is late.

10 MS. PUCCINELLI: Apologies, Your Honor.

11 And with regard to the third step of the disparate
12 impact analysis, first of all, the Court in this posture need
13 only reach the third step if it finds that there is no
14 dispute of material --

15 THE COURT: As a concession to the shortness of life,
16 let's get to the bottom. Your view is the defendants should
17 not receive summary judgment. All right. Let's assume
18 that's right. What do you think should go to a jury in this
19 case? What issues should go to a jury in this case?

20 MS. PUCCINELLI: Your Honor, I think the second and
21 third steps should go to the jury in this case.

22 THE COURT: Specifically what? What is it a jury is
23 going to be asked to decide on those two steps?

24 MS. PUCCINELLI: The jury is going to be asked
25 whether a Social Security number or a passport, visa, and

1 I-94 are necessary to satisfy defendants' five purported
2 business interests.

3 THE COURT: If you need an opportunity to consult,
4 rather than interrupt your colleague, ask for it, and I will
5 grant it. Otherwise, it is disruptive.

6 MR. SANDOVAL-MOSHENBERG: Yes, Your Honor. Thank
7 you.

8 MS. PUCCINELLI: And if the jury does find that those
9 interests are business necessities, whether or not any policy
10 that plaintiffs can articulate essentially shows that those
11 policies are not -- that the policy at issue is not necessary
12 to fulfill the business interests of plaintiffs and can be
13 better served by a less discriminatory policy.

14 THE COURT: All right. Thank you.

15 Very brief response.

16 MR. DINGMAN: Here's my very brief response, Your
17 Honor: As articulated by counsel, their argument is a step
18 three argument. There is no dispute that the policy or the
19 valid interest at step two is verifying identification to
20 conduct these background checks. They do not dispute that
21 that is a valid legitimate interest, business necessity,
22 whatever you want to call it. And I would ask the Court to
23 go back and look at *Inclusive Communities*, because the court
24 there specifically said, if a private entity can show a valid
25 interest, that's enough.

1 When they get to the foreign passport and point to us
2 and say they have not proven they're invalid, that's not the
3 burden. Your Honor. It's step three, it's plaintiffs'
4 burden to show that they're proffering a viable alternative.
5 So it's their burden to present evidence that foreign
6 passports are sufficient. It is their burden to present
7 evidence that ITINs are just as good. It is not ours.

8 THE COURT: All right. Thank you. I will take the
9 matter under advisement, and you'll hear from me on it.

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11 (Proceedings adjourned)
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CERTIFICATE OF OFFICIAL COURT REPORTER

I, Patricia A. Kaneshiro-Miller, certify that the foregoing is a correct transcript from the record of proceedings in the above-entitled matter.

/s/ Patricia A. Kaneshiro-Miller

May 1, 2020

PATRICIA A. KANESHIRO-MILLER

DATE

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PATRICIA A. KANESHIRO-MILLER, RMR, CRR
OFFICIAL COURT REPORTER

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA
202-354-3243

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